conjunctively or in the alternative. As grounds for this motion, petitioner states the following:

I.

THE RESTORATION TO THE CALENDAR FOR REARGUMENT OF DUTTON v. EVANS, NO. 10, OCTOBER TERM, 1970.

On June 29, 1970, following the submission of petitioner's opening brief, this Court ordered the matter of *Dutton* v. *Evans*, 10, October Term, 1970, restored to calendar for reargument, 38 U.S. L.W. 3521. Reargument took place 13 October 1970, the day following this court's denial of the petitioner's petitions for mandamus and/or certiorari. Because of these time factors, petitioner was unable to include in his petition or reply memorandum the matter of the continued pendency of *Dutton*, supra.

In *Dutton* v. *Evans*, supra, there is now before this court the opportunity to rule upon the constitutionality of the co-conspirator exception to the hearsay rule, an issue which is a major portion of petitioner's applications on file in this court. The decision of this court in *Dutton*, is certain to affect each circuit and its impact felt in all the states. The ruling will affect posture of the petitioner's application for writs of mandamus and/or certiorari since the U.S. Court of Appeals for the Ninth Circuit, by affirming this petitioner's conviction, held impliedly that the confrontation clause of the Sixth Amendment of the United States Constitution was not violated by the frequent and continued

introduction of hearsay testimony notwithstanding the fact that the out-of-court declarant was petitioner's accuser. Because of these similarities and the importance of affording this petitioner the review he seeks in light of current decisions this request for rehearing should be granted and the instant case reviewed concurrent with *Dutton*, supra.

Review of petitioner's applications for writ of mandamus and/or certiorari is made especially important since petitioner was charged, tried and convicted in Federal Court. The constitutional issue is therefore unfettered by State Court rulings. The common denominator between *Dutton* and the instant case is the use of hearsay accuser testimony and the issue of the constitutionality of the co-conspirator exception to the hearsay rule, in light of the protection of the Sixth Amendment confrontation clause. It is clear that under the facts of both cases that literal confrontation did not occur. The question now becomes—Was there a rational substitute for literal confrontation which could be found, and did the situation require that something less than literal confrontation be accepted by the court?

In his Amicus Curiae Brief for the United States, in *Dutton* v. *Evans*, supra, Erwin N. Griswold, Solicitor General, accurately points out that, in order to be admissible at all, hearsay testimony, be it co-conspirator statements or otherwise, must contain the important factor of necessity, that is, the unavailability

of the out-of-court declarant. In addition thereto, there must be certain safeguards to assure the trustworthiness of the evidence such has been found in the availability of cross-examination at a prior trial of hearing. In the instant case these records were absent. The prosecutor controlled all means of producing the absent witness in court and failed to do so, and the absent material defense witness did not testify, nor did petitioner or his defense counsel have the opportunity to cross-examine him at any time, so far as the record reveals.

Additionally, the Solicitor General, in his Amicus Curiae Brief mentioned above, repeatedly recites the requirement of asbence of fault on the part of the Government, Brief p. 18, wherein he states:

> "the prosecution should be required to show no more than that, through no fault of its own, an important declarant is not available to testify."

In the instant case, the prosecutor was not free of fault.

The prosecutor was involved in the witness' absence by virtue of the District Court's order and by virtue of being totally in control of the only procedures available to secure the presence of the witness. Having failed to accomplish the mechanics of assuring the presence of the absent witness, the prosecutor in the instant case clearly involved the United States in the

cause of the absent witness' unavailability and was therefore primarily responsible for the absence of the witness. (Petitioner's Petition, pp. 45-58.)

This Court will now, in ruling on *Dutton* v. *Evans*, supra, decide if fault on the part of the prosecution will nullify the applicability of the co-conspirator rule. This is a crucial issue in the instant case and petitioner should be permitted review in light of this pending decision. Accordingly, this Court should grant this petition for rehearing and retain this case for review and decision simultaneous with *Dutton*.

II.

THE GROWING CONFLICT BETWEEN THE CIRCUITS ON THE APPLICATION OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

In *Evans* v. *Dutton*, 400 Fed.2d, 826, 1968 case in United States Court of Appeals for the Fifth Circuit reversed the decision of the Georgia Supreme Court. *Evans* v. *State*, 222 Georgia 392, 150 S.E.2d, 240 (1960), and in doing so held that:

> "If an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact."

In the instant case, the U.S. Court of Appeals for the Ninth Circuit ruled that hearsay testimony purportedly introduced under the co-conspirator exception to the hearsay rule was not antagonistic to the constitutional guarantees of confrontation, relying on its own decision in *Carbo* v. *U.S.*, 314 Fed.2d, 718 Ninth Circuit 1963. Certiorari denied, 377 U.S. 953 (1964). In *Carbo*, supra, the propriety of the use of such hearsay testimony was not examined with respect to its antagonism to the confrontation clause of the Sixth Amendment of the Constitution. The Ninth Circuit therefore by avoidance ruled contrary to the Fifth Circuit in *Evans* v. *Dutton*, supra, despite the fact that petitioner in his briefs to the U.S. Court of Appeals for the Ninth Circuit emphasized the constitutional issue contained in the co-conspirator exception to the hearsay rule.

In view of the current decisions of this Court in petitions now pending, which involve the evaluation of the constitutionality of hearsay testimony admitted under the co-conspirator exception to the hearsay rule, it is clear that the decision below should be reviewed since the latest interpretation of this Court was not considered by the U.S. Court of Appeals for the Ninth Circuit in making its decision in the instant case. The foregoing conflict should be set at rest by this Court.

The pending ruling of this Court in *Dutton* v. *Evans*, supra, will have an immense bearing on the resolution of these differences and petitioner herein

should be accorded the benefit of that decision and the resolutions of conflict between the Ninth and Fifth Circuits. This Court should recognize the similarity of issues between these cases and allow petitioner review of his case on the basis of the most current decision of this Court.

CONCLUSION

For the reasons set forth above, as well as those contained in petitions for writ of mandamus and/or certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petitions to correct the record on appeal and to review the judgment and opinions below in light of the corrected record.

Dated: November 18, 1970.

Respectfully submitted,

MARKELL C. BAER,

MURRAY B. PETERSEN,

Co-counsel for Petitioner

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

MARKELL C. BAER,

MURRAY B. PETERSEN,

Co-counsel for Petitioner

PROOF OF SERVICE

I, Murray B. Petersen, co-counsel for petitioner in this Petition for Mandamus and/or Certiorari and counsel of record for petitioner in the United States Court of Appeals for the Ninth Circuit, and a member of the Bar of the Supreme Court of the State of California and of the United States Court of Appeals for the Ninth Circuit, hereby certify that I served two copies of the foregoing "Petition for Rehearing" on each of the following named individuals by depositing the same in a United States mail box, with first class postage prepaid, this 18th day of November, 1970, at Oakland, California, addressed as follows:

HON. ERWIN GRISWOLD
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

HON. OLIVER D. HAMLIN, JR.
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

HON. JAMES R. BROWNING
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

HON. HARRY PREGERSON
United States District Judge, Central District of California (sitting by designation), by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

JUDGES AND OFFICERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, by mailing 10 copies addressed to William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

JAMES L. BROWNING
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

MURRAY B. PETERSEN
Co-Counsel for Petitioner,
WINSTON BRYANT MCCONNEY

Subscribed and sworn to before me a Notary Public in and for the State of California, County of Alameda, this 18th day of November, 1970.

MARGARET R. HAUSKNECHT